LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAY 15 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 1006.

DOMINIC SCIRIA,

Petitioner,

vs.

JOHN M. LEHMANN, Officer in Charge,
U. S. Immigration & Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

HENRY C. LAVINE,
Marshall Bldg., Cleveland, Ohio,
Attorney for Petitioner.

TABLE OF CONTENTS.

Opinions Below 1
Jurisdiction 1
Questions Presented 2
Statutes Involved 3
Statement of Facts 4
Argument 6
APPENDIX:
Opinion of Board of Immigration of Appeal 15
Opinion of the United States Court of Appeals, for the Sixth Circuit 18
Judgment of the United States Court of Appeals for the Sixth Circuit 19
Order Denying Petition for Rehearing 19

TABLE OF AUTHORITIES.

Cases.

Jay vs. Boyd, 351 U. S. 345, 76 S. Ct. 919 ..... 6, 7
Lehmann, etc., vs. U. S. A. ex rel. Bruno Carson, 228 F. 2d 142 ..... 10, 13, 14
Maeztu vs. Brownell, 132 F. Supp. 751 8

Statutes.

Immigration and Nationality Act of 1952 (McCarran Act):
Sec. 241(a)(1) 2, 3-4, 9
Sec. 244(a)(1) 3
Sec. 251(d) 2, 4, 9, 10, 14
Sec. 405(a) 10, 14
Sec. 1254 (8 U. S. C.) 2
8 C. F. R. 244.3 7

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. _____.

DOMINIC SCIRIA,

Petitioner,

vs.

JOHN M. LEHMANN, Officer in Charge,
U. S. Immigration & Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Now comes Henry C. Lavine, Attorney for Dominic Sciria, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which Court affirmed the order of petitioner's deportation.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix page 15), is reported at 248 F. 2d 519. The memorandum of the District Court is reported at 136 F. S. 458.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 14th, 1957. A timely petition for rehearing was denied on February 21st, 1958. The Appellate Court extended the time to file a Petition for a Writ of Certiorari in the Supreme Court of the United States to May 18th, 1958. The jurisdiction of this Court is invoked under the Im-

migration and Nationality Act of 1952 (McCarran Act), Section 1254 and Section 241(a)(1).

QUESTIONS PRESENTED.

1. (a) Whether the Board of Immigration Appeals committed prejudicial and reversible error in this case in denying the petition for suspension of deportatation based on the entire record and confidential information relating to this petitioner, which confidential information was not disclosed to either this petitioner or his attorney.

(b) Whether in this case, in which there is a finding by the administrative officers that this petitioner is not and never was connected in any subversive activities or any activities that could bear on the safety and security of the United States, does the Special Inquiry Officer and the Board of Immigration Appeals have the unlimited right to deny suspension on a question of **confidential information** without giving any reason or explanation for their act in view of the fact that the nature of the case itself does definitely not involve the security and safety of the United States.

2. (a) Whether there is a difference in status between an alien who became non-deportable in 1922 by operation of the laws of 1917 and 1924 from another alien who acquired legal status by himself initiating action under the same laws of 1917 and 1924 which provided certain relief for aliens to acquire legal status.

(b) Does Section 241(d) of the Immigration and Nationality Act of 1952 limit the deportation of aliens who were excludable at the time of entry to those aliens who remained in the excludable class on June 27th, 1952, the date of the enactment of this Act? Did Congress intend to immunize from deportation those aliens who did no longer

belong or were no longer **belonging** to the excludable class of aliens in Section 241(a)(1) at the time of the enactment of the Act of 1952?

STATUTES INVOLVED.

Section 244(a)(1) of the Immigration and Nationality Act of 1952:

> "As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who * * *
>
> "(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; or * * *"

Section 241(a)(1) of the Immigration and Nationality Act of 1952:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry. * * *"

Section 241(d) of the Immigration and Nationality Act of 1952:

"(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

STATEMENT OF FACTS.

Dominic Sciria, the petitioner, is a native of Italy who entered the United States as a stowaway on or about July 28th, 1922. He is now about fifty-eight years of age, married to a native-born United States citizen, and is the father of two sons, both of whom have recently completed service with the Armed Forces of the United States, and both of whom were honorably discharged from service. Appellee has resided continuously in the United States since his arrival in 1922, nearly all of these years in Cleveland, Ohio.

The only charge contained in the warrant of deportation is that of stowaway in July of 1922.

Late in the year of 1927 the Government sought to deport this appellee, but the proceeding against him was dismissed because it had been commenced subsequent to five years after his entry, in line with the Statute of

Limitations governing stowaways who entered the United States prior to July 1st, 1924.

In 1928 Sciria was convicted of the charge of illegally transporting intoxicating liquor, in violation of the laws of West Virginia, and was sentenced to serve a term of ten months in prison. In 1942 he was convicted in the Court of Common Pleas, Cuyahoga County, Ohio, of the crime of blackmail and was sentenced to one year. The crimes are not a basis of this deportation action.

On December 30th, 1954, the Board of Immigration Appeals, in an Order, denied this appellee's appeal for suspension of deportation and gave as the principal reason for so doing the following statement:

> "There is confidential information in the file to sustain our finding that the respondent's case is not one to be sent to Congress with a request for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act. Confidential information is not considered in determining an issue or question of deportability, but it is proper to use such information in considering the issue of discretionary relief. The use of such information for this purpose is sanctioned by 8 C. F. R. 244.3 (*Matter of O—*, E-057357, Int. Dec. 519). He has been granted permission to depart voluntarily from the United States, in lieu of deportation and on this record, this is the maximum relief warranted as a matter of discretion. Accordingly, the following order will be entered.
>
> "ORDER: It is ordered that the appeal be dismissed."

The Board, as well as the Special Inquiry Examiner both stated that this appellee was statutorily eligible and that he has established good moral character for the statutory period.

ARGUMENT.

1. (a) Whether the Board of Immigration Appeals committed prejudicial and reversible error in this case in denying the petition for suspension of deportation based on the entire record and confidential information relating to this petitioner, which confidential information was not disclosed to either this petitioner or his attorney.

(b) Whether in this case, in which there is a finding by the administrative officers that this petitioner is not and never was connected in any subversive activities or any activities that could bear on the safety and security of the United States, does the Special Inquiry Officer and the Board of Immigration Appeals have the unlimited right to deny suspension on a question of **confidential information** without giving any reason or explanation for their act in view of the fact that the nature of the case itself does definitely not involve the security and safety of the United States.

What we want to say is, it is our opinion that neither the Special Inquiry Officer nor the Board of Immigration Appeals has the right to arbitrarily and capriciously deny suspension of deportation and base that denial wholly or partially on confidential information without giving a reason or explanation therefor. We contend that if the Board does act on confidential information there must be in the case evidence of subversion, espionage acts, or conspiracy against the Government in any way that would endanger the Government of the United States and therefore could be construed as involving the safety and security of the United States. In that event no disclosure need be given in the finding on confidential information. Or, it is possible that as in *Jay vs. Boyd*, 351 U. S. 345, 76 S. Ct. 919, where the case itself involved a communist,

a member of an organization whose aim and purpose was to overthrow the United States Government by force, a finding by the Board or even the Special Inquiry Officer perhaps need not be gone into with explanations if in the opinion of the Board it would be prejudicial to the best interests, safety and security of the Country.

But our case, where the most that happened was one minor offense of bootlegging and one offense involving gambling, could in no way, shape or form prejudice the interests of the United States Government, nor could it in any way involve the security and safety of our Country. In that event neither the Special Inquiry Officer nor the Board of Immigration Appeals has any right to deny suspension of deportation based on confidential information and cite the particular law, Section 244.3 of the Nationality Act of 1952, as their authority. (Appendix page 17.)

In that connection the Supreme Court said in *Jay vs. Boyd (supra)*, on page 927:

> "**It may be that section 244(a) cannot be interpreted as allowing a decision based on undisclosed information in every case involving a deportable alien qualified for suspension. Thus, it could be argued that, where there is no compelling reason to refuse to disclose the basis of a denial of an application, the statute does not contemplate arbitrary secrecy.** However, the regulation under attack here limits the use of confidential information to instances where, in the opinion of the special inquiry officer or the Board of Immigration Appeals, 'the disclosure * * * would be prejudicial to the public interest, safety, or security.' If the statute permits any withholding of information from the alien, manifestly this is a reasonable class of cases in which to exercise that power." (Emphasis supplied.) (This involves an alien communist.)

It would not be fair or proper to assume that the mere statement of the evidence of confidential information in the file connotes that the Board has investigated and found that the disclosure of such would be prejudicial to the best interests, safety and security of the Country. It must go farther. There either must be evidence in the file of subversive actions or the probability thereof, or the nature of the case itself must be such that it could be immediately accepted as a condition existing which would border and could involve the safety and security of the United States. But certainly, where there is no evidence of any subversive activity as is stated in this case by the Special Inquiry Officer and the Board of Immigration Appeals, and where the nature of this case is such that there is not even a possibility of involving the safety and security of the Country, then it is our opinion that the Special Inquiry Officer and the Board of Immigration Appeals exceeded their authority, acted arbitrarily and capriciously, and that their decision should be set aside and their opinion should be reversed.

We believe this is just what the Court had in mind in the case of *Maeztu vs. Brownell*, 132 F. Supp. 751, where on page 753 the Court said:

> "* * * Undoubtedly confidential information is of inestimable value to executive officers in the performance of their duty, and I would not wish to be understood as saying anything to the contrary. But such great value is that it may be, and frequently should be, used in obtaining factual data that may be used of record. It is not in and of itself the stuff of which decisions affecting the life, liberty and property of persons are made.
>
> "There is no place in this Government, in its legislative, judicial or executive departments, for

arbitrary action, and there is no way to know whether such action is arbitrary or not, unless the basis upon which it is taken is revealed. It seems to me to be of immense importance now that the principles of this Government in this respect be unequivocally stated." (Emphasis supplied.)

The facts surrounding this 58-year-old man are that he has a native-born American wife, two children who served in the United States Army, and several grandchildren; that kind of a situation certainly sets up a proper enough occasion to grant relief to such a man, the only ground for his deportation being that he was a stowaway in 1922, at a time when there was a law in existence that he could not be deported on that ground. We therefore feel that to deny him this relief is not only arbitrary and capricious but lacks all consideration on humane grounds in view of the facts and law as set forth herein.

2. (a) Whether there is a difference in status between an alien who became non-deportable in 1922 by operation of the laws of 1917 and 1924 from another alien who acquired legal status by himself initiating action under the same laws of 1917 and 1924 which provided certain relief for aliens to acquire legal status.

(b) Does Section 241(d) of the Immigration and Nationality Act of 1952 limit the deportation of aliens who were excludable at the time of entry to those aliens who remained in the excludable class on June 27th, 1952, the date of the enactment of this Act? Did Congress intend to immunize from deportation those aliens who did no longer *belong* or were no longer *belonging* to the excludable class of aliens in Section 241(a)(1) at the time of the enactment of the Act of 1952?

The facts in this case are somewhat different than the facts in *John M. Lehmann, etc., vs. U. S. A. ex rel. Bruno Carson,* 228 F. 2d 142. In *Carson* the respondent entered the United States as a stowaway in 1919. No action was taken to deport him "within five years after entry." In this *Sciria* case the Government did take action to deport Sciria in 1927 but the action was dismissed because it had been commenced subsequent to five years after his entry.

The Sciria case was decided by the Trial Court and Judge McNamee in his Opinion held that Sciria was not deportable because he was protected by the savings clause, Section 405(a) of the Immigration and Nationality Act of 1952 (McCarran Law), in that he attained a status of non-deportability under prior law and that Section 241(d) does not specifically provide for deportation notwithstanding the savings clause; he further held that the savings clause takes precedence in this case because of the lack of specificity in Section 241(d), which would, or could, take this Sciria case out of the savings clause.

However, in the case of *Lehmann vs. Carson* it was decided by the Supreme Court of the United States on June 3rd, 1957, reversing the Appellate Court opinion as contained in 228 F. 2d 142, as follows:

> "By its express terms, Section 405(a) does not apply if it is 'otherwise specifically provided' in the Act. As respects the grounds of deportation involved here, we think the Act does otherwise specifically provide in Section 241, 66 Stat. 204, 8 U. S. C., Section 1251. * * *"

This Court is hereby respectfully petitioned to reconsider its ruling in the *Carson* case because the opinion fails to distinguish whether the Court intended that all aliens

are deportable who were excludable at the time of entry from those aliens who were excluable at the time of entry and later adjusted their status in the United States to legal residence.

The Court is respectfully urged to consider the fact that the two repealed laws, 1917 and 1924, provided certain reliefs for the benefit of aliens to adjust status. Equally, it must be considered that the laws which provided that any alien who entered the United States illegally prior to July 1st, 1924, was not deportable on that ground, and the other provision that a stowaway who entered the United States prior to July 1st, 1924, is not deportable if action for his deportation is not begun within five years of the time of his entry.

It is fit and proper to assume that these two relief measures passed by Congress and in effect at the time of this alien's entry were relief measures in the same sense as the other relief measures that were in effect at that time for his benefit such as registry, suspension of deportation, conditional pardon, and the marrying of a native-born citizen to legalize their entry. The only difference is that the two laws were relief measures by operation of law and the other relief measures were supposedly to be initiated by the alien. But all of these can properly be considered relief measures. Therefore, a proper query is,

> is there a distinction between a relief measure by operation of law from a relief measure which is provided in the law that the alien must initiate in behalf of himself?

Whatever the answer, the alien was excludable at the time of his entry and if all aliens who were excludable at the time of entry are deportable, then all those aliens

who did initiate for themselves the reliefs provided for in the laws of 1917 and 1924 would also be deportable.

It seems to undersigned counsel that the alien had just as much right to rely on his relief by operation of law as he did on the other relief measures provided in the same law. We certainly cannot see any distinction or difference. In one instance the law says that he can stay, merely by coming in at a certain time or by the failure of the Government to take certain action within a certain time. In the other instance, the law says he can stay if he has initiated certain relief measures in behalf of himself within a certain time under the same law. Now, if the alien who relied upon the operation of law relief cannot obtain the relief that the law intended, then why should the other alien who initiated the reliefs provided in the same law in behalf of himself be permitted to remain and become non-deportable?

Counsel does believe that Congress intended to treat all aliens alike and that the reliefs provided for them should be enforced in a like and in an impartial manner. We do not believe that Congress intended to deport these aliens who took those steps to legalize their entry under the same laws that were repealed by the Act of 1952 and we also believe that the relief provided by operation of law was also intended by Congress to protect the alien against deportation.

It is only right, fair and proper to protect an alien who took the proper steps to legalize his entry under the laws of 1917 and 1924 in order to remain in the United States even though he was excludable at the time of his entry, and it is only fit and proper to state that Congress so intended. By the same token, it is only fit and proper to permit those aliens who were excludable at the time of

entry during the existence of those two repealed laws and who remained in the United States for many, many years thereafter, relying upon the same law that all aliens relied upon, knowing that although they were excludable at the time of entry the passage of time would permit them to remain and give them the same standing that the other aliens had who took certain steps to legalize their entry.

Tens of thousands of aliens who are now in the United States legally were excludable at the time of their entry, just like Sciria and just like Carson. Isn't it proper to ask, are all of these tens of thousands of aliens now deportable because they were at the time of entry excludable? Even though they took advantage of the reliefs provided for them in the laws of 1917 and 1924?

The opinion in *Carson*, which is now binding upon all Courts, does not make any distinction and does not explain the existence of any difference in the two kinds of reliefs provided for aliens as set forth herein, and it is counsel's hope and prayer that this Court grant this petition for a writ of certiorari and admit this case for review to clarify and to state whether there is any such distinction in the relief law and the relief measures that were provided for aliens in the laws of 1917 and 1924.

The Court is hereby respectfully urged to consider that the thousands of aliens who have established their legal residence in the United States by conditional pardon, registry, suspension of deportation, and by marriage to a United States citizen, and thereby became legal residents, are troubled because of the lack of the distinction made, if any, in the opinion as between them and Carson and are naturally apprehensive and worried if they, too, are deportable because they, too, were excludable at the time of their entry.

It is unreasonable to believe that when Congress passed the Immigration Acts of 1917 and 1924 it intended that the relief measures contained in the law were not intended to change the excludability of an alien who arrived in the United States during those years for which the statute of limitations was provided, as well as the law providing that there be no deportation for an alien on merely illegal entry if he came in prior to July 1st, 1924. It would be just as unreasonable to believe that the thousands of aliens who actually took steps to legalize their entry should now be considered deportable for the sole reason that they were excludable at the time of their entry.

In undersigned counsel's opinion, this is the reason Congress uses the present tense of "belong" twice in Section 241(d), which the Supreme Court held in the *Carson* case was the section that took the case out of the savings clause, Section 405(a).

Because of the great importance of this decision and its effect upon our alien-born populace, the Court is respectfully urged to grant certiorari to permit a review of this Sciria case on the questions involved.

Respectfully submitted,

HENRY C. LAVINE,
Marshall Bldg., Cleveland, Ohio,
Attorney for Petitioner.

APPENDIX.

OPINION OF BOARD OF IMMIGRATION OF APPEALS.

U. S. DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION OF APPEALS

Dec. 30th, 1954.

File: A-5521112—Buffalo

In Re: DOMINIC SCIRIA OR DOMINIC SCERRIA

IN DEPORTATION PROCEEDINGS

CHARGES:

Warrant: Act of 1952—Stowaway
Act of 1952—No travel document as required by Act of May 22, 1918

Lodged: None

APPLICATION: Suspension of deportation—Exceptional and extremely unusual hardship

DETENTION STATUS: Released under bond

The special inquiry officer on November 9, 1954, entered an order denying the respondents' application requesting that his deportation be suspended under the provisions of Section 244(a)(1) of the Immigration and Nationality Act of 1952 and directed that he be deported from the United States pursuant to law on the charges stated in the warrant of arrest. When this case was last before us on June 11, 1954, we entered an order remanding the case to the special inquiry officer for the purpose of having the record made to show the results of a current character investigation and any other additional evidence pertinent to the issue of discretionary relief.

The respondent, a 55-year-old married male, a native and citizen of Italy, has resided continuously in the United States since his arrival as a stowaway at New York, New York on July 28, 1922 at which time he effected entry

without being examined by an officer of the Service and without documents. The respondent has never been admitted to the United States for permanent residence. He was married to a native-born citizen of the United States at Marblehead, Ohio on June 1, 1929 and he is the father of two native-born citizen sons, 24 and 21 years of age, respectively, both of whom are now members of the Armed Forces of this country. Respondent's wife has been gainfully employed for the past 15 years. The record indicates that the respondent had no record of gainful employment until June 1951. Since that time, he has been employed in various breweries located in Cleveland, Ohio.

Since 1928, the respondent has been convicted and sentenced to imprisonment for various infractions of the law. He was arrested in Charleston, West Virginia and charged with transportation of liquor during the year of 1928, for which he was convicted and sentenced to imprisonment for a period of ten months. He was also convicted on September 8, 1942 for violation of Section 13384 of the Ohio General Code (blackmailing), for which he was sentenced to imprisonment in the Ohio State Penitentiary until legally discharged (Ex. 3). Since his release on parole on October 1, 1944, he has been arrested and charged with investigation on several occasions (p. 6).

It is conceded that the respondent has established good moral character for the statutory period and that he has been physically present in the United States for a continuous period for at least seven years prior to January 11, 1954, the date upon which he made application requesting that his deportation be suspended under the provisions of Section 244(a)(1) of the Immigration and Nationality Act of 1952. An independent character investigation conducted by the Service is not entirely favorable to the respondent's application for the discretionary relief

of suspension of deportation (Ex. 12). Counsel by brief requests that the respondent's deportation be suspended and in support thereof, he submitted affidavits executed by three of the witnesses referred to in the investigatory report identified in this record as Exhibit 11. Counsel further asserted that the affidavits executed by these three witnesses are entirely favorable to the respondent's character and will serve to negate any derogatory interpretation which may have been placed upon the conclusions of the investigator who made the independent character investigation on June 17, 1954.

On this record, we are unable to make the required finding that the respondent's deportation would result in exceptional and extremely unusual hardship to himself or to his family. Furthermore, we do not believe that this is a case that should be sent to Congress with the request for suspension of deportation.

There is confidential information in the file to sustain our finding that the respondent's case is not one to be sent to Congress with a request for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act. Confidential information is not considered in determining an issue or question of deportability, but it is proper to use such information in considering the issue of discretionary relief. The use of such information for this purpose is sanctioned by 8 C. F. R. 244.3 (*Matter of O—*, E-057357, Int. Dec. 519). He has been granted permission to depart voluntarily from the United States, in lieu of deportation and on this record, this is the maximum relief warranted as a matter of discretion. Accordingly, the following order will be entered.

ORDER: It is ordered that the appeal be dismissed.

Chairman

OPINION OF THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

Before ALLEN, MARTIN and MILLER, *Circuit Judges.*

PER CURIAM. In this case, the petition of Dominic Sciria for writ of habeas corpus, challenging the legality of an order of deportation, was granted.

The petitioner-appellee entered the United States as a stowaway and without a passport in July of 1922 and has resided continuously in this country since his unlawful entry. He has been twice convicted and sentenced to penal servitude for two offenses violating, respectively, the law of West Virginia relating to unlawful liquor traffic and the law of Ohio covering blackmail. In a careful opinion, United States District Judge McNamee gave well-considered reasons for his action in granting the petitioner's application for writ of habeas corpus.

In behalf of the government, the appropriate Officer in Charge, United States Immigration and Naturalization Service, has appealed from the district court's order; and the United States Attorney for the Northern District of Ohio has prosecuted this appeal.

Since the opinion of the United States District Judge was written, the Supreme Court [*Lehmann v. United States, ex rel. Bruno Carson, or Bruno Carusaniti,* 353 U. S. 685, rehearing denied 354 U. S. 944] has decided the issues here involved against the contention of the petitioner-appellee and contrary to the decision of the district court. The Supreme Court held that the savings clause, section 405, of the 1952 Immigration and Nationality Act, does not preclude deportation under section 241(a)(4), and (b), of an alien who had entered this country in 1919 as a stowaway and who had received a conditional pardon for one of two convictions in 1936,

the alien not having been deportable until the 1952 Act became effective. The *Bruno Carson* case is not distinguishable from the case at bar.

Accordingly, upon the compelling authority of the *Carson* case, the judgment of the district court is reversed; and the petition of appellee for writ of habeas corpus is denied.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed October 14, 1957.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed; and the petition of appellee for writ of habeas corpus is denied.

ORDER DENYING PETITION FOR REHEARING.

(Filed February 21, 1958.)

The petition for rehearing is denied.

LIBRARY
SUPREME COURT, No. 1006

Office - Supreme Court, U.S.
FILED
JUN 6 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

DOMINIC SCIRIA, PETITIONER

v.

JOHN M. LEHMANN, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulation involved	2
Statement	4
Argument	9
Conclusion	13

Citations

Cases:

Hintopoulos v. *Chaughnessy*, 353 U.S. 72	10
Jay v. *Boyd*, 351 U.S. 345	11
Lehman v. *Carson*, 353 U.S. 685	2, 8, 9, 11, 12
Mulcahey v. *Catalanotte*, 353 U.S. 692	11

Statutes and Regulation:

Immigration and Nationality Act of 1952	
Section 241 (66 Stat. 204; 8 U.S.C. 1251)	2, 4, 8, 13
Section 405(a) (66 Stat. 280; 8 U.S.C. 1101, Note)	3, 8, 11
8 C.F.R., 1952 rev., 244.3	2, 4, 7, 11

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1006

DOMINIC SCIRIA, PETITIONER

v.

JOHN M. LEHMANN, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 18-19) is reported at 248 F. 2d 519. The memorandum opinion of the District Court (Appellant's App. 5a-14a) [1] is reported at 136 F. Supp. 458.

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1957 (Pet. 19) and an order denying

[1] References to the appendices to the appellant's (the present respondent's) main brief and reply brief in the Court of Appeals are designated as "Appellant's App." and "Appellant's Reply App.", respectively.

a petition for rehearing on February 21, 1958 (Pet. 19). The petition for a writ of certiorari was filed on May 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals, which denied petitioner the discretionary relief of suspension of deportation on the basis of a lack of showing that his deportation would result in exceptional and extremely unusual hardship, erred in making an alternative finding, on the basis of confidential information which it was empowered to consider under a service regulation, 8 C.F.R., 1952 rev., 244.3, that his case was not a proper one to be sent to Congress.

2. Whether this Court's recent opinion in *Lehmann* v. *Carson*, 353 U.S. 685, that an illegal entrant who could not be deported under prior laws is deportable under the 1952 Act, should be reexamined.

STATUTES AND REGULATION INVOLVED

The Immigration and Nationality Act of 1952 provides:

> Section 241 [66 Stat. 204; 8 U.S.C. 1251].
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other

than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act [June 27, 1952], or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * *

Section 405(a) [66 Stat. 280; 8 U.S.C. 1101, Note].

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the

> statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

A regulation of the Immigration and Naturalization Service (8 C.F.R., 1952 rev., 244.3) provided:

> *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Sixth Circuit (Pet. 19) reversing an order of the District Court for the Northern District of Ohio granting a writ of habeas corpus on the basis that petitioner, who entered this country illegally as a stowaway on or about July 28, 1922, had acquired a status of nondeportability and was consequently not subject to deportation under Section 241(a)(1) of the Immigration and Nationality Act of 1952 (66 Stat. 204, 8 U.S.C. 1251(a)(1)).

The relevant facts may be summarized as follows:

Petitioner, a citizen of Italy, entered the United States on July 28, 1922 at New York City as a stowaway without passport or other travel documents, and there evaded inspection by United States immigration officers, intending to remain permanently in the United States (Appellant's Reply App. 17a-22a; Appellant's App. 2a-3a). A warrant of arrest was issued on December 16, 1953, charging that petitioner was subject to deportation, having entered the country illegally as a stowaway and without travel documents (Appellant's App. 3a). On January 28, 1954, after a hearing under the warrant, the special inquiry officer found on the facts that petitioner was deportable as charged.[2] The special inquiry officer also denied petitioner's application for suspension of deportation, finding that, although he was statutorily eligible for consideration for such relief (Appellant's Reply App. 20a), "careful consideration of the evidence leads to the conclusion that the degree of hardship which would result is not sufficient to justify a finding that it would be 'exceptional and extremely unusual hardship' so as to satisfy the requirements of the Act of 1952."

On appeal to the Board of Immigration Appeals, petitioner excepted only to that part of the Special Inquiry Officer's report finding him ineligible for suspension of deportation. On June 11, 1954, the Board

---

[2] Petitioner testified on the hearing that he had been convicted of two crimes. In 1928, he was convicted in West Virginia of the crime of transporting liquor, and in 1942 in Ohio was convicted of the crime of extortion (Appellant's Reply App. 18a-19a). The finding of deportability, however, was not based on this evidence.

of Immigration Appeals, noting that the record did not contain a current neighborhood investigation of petitioner, returned the case to the special inquiry officer for such investigation without passing on the merits of the application for suspension (Appellant's Reply App. 22a-23a). Such investigation was made, and a new order was rendered by the special inquiry officer on November 9, 1954, denying petitioner's application for suspension (*Ibid.*, pp. 23a-25a). This order states in pertinent part (*Ibid.*, p. 24a):

> A report of a neighborhood character investigation conducted by this Service was entered into evidence as Exhibit No. 11 over objection of counsel in connection with the last sentence shown in the report with respect to statements relative to the respondent's previous employment made by the three witnesses interviewed. This statement is as follows: "All stated that to their knowledge the subject had never had a legitimate occupation until approximately two or three years ago."
>
> Report shows that these witnesses are unwilling to appear to testify against the respondent for which reason counsel concluded that it would vain to ask that they be called for examination, and no specific request that they be called was entered. As the period of employment in question was approximately two or three years ago and respondent, himself, has previously testified that he was unemployed from about 1946 to about 1951 due to an eye ailment, the report was properly entered into evidence.
>
> * * * *
>
> Report of the investigation conducted does not establish that the respondent has conducted him-

> self as other than a person of good moral character since 1946. However, upon full and careful consideration of all the evidence and attending facts and circumstances in this case, no further evidence has been submitted which we feel would justify reconsideration or change in our previous decision and order in this case.

On petitioner's further appeal, the Board of Immigration Appeals, under an order dated December 30, 1954, dismissed the appeal (Pet. 15-17), stating that (Pet. 17), "On this record, we are unable to make the required finding that the [petitioner's] deportation would result in exceptional and extremely unusual hardship to himself or to his family." The order also stated (Pet. 17) "Furthermore, we do not believe that this is a case that should be sent to Congress with the request for suspension of deportation," and observes that this latter conclusion is supported by confidential information in the file, which though not competent on the issue of deportability, was proper to use "in considering the issue of discretionary relief", pursuant to a regulation of the Service (8 C.F.R., 1952 rev., 244.3). The order concludes (Pet. 17), "He has been granted permission to depart voluntarily from the United States, in lieu of deportation and on this record, this is the maximum relief warranted as a matter of discretion."[3]

---

[3] On his appeal, petitioner attacked only the denial of his application for suspension of deportation and the opinion of the Board of Immigration Appeals is captioned in part "APPLICATION: Suspension of deportation—Exceptional and extremely unusual hardship". In connection with his appeal, petitioner submitted character affidavits executed by

On April 12, 1955, petitioner instituted the instant action for habeas corpus seeking release on the ground that he had a status of non-deportability under the prior immigration laws which was preserved by the savings provision in Section 405(a) of the Immigration and Nationality Act of 1952 (66 Stat. 280, Note following 8 U.S.C. 1101), so as to render him non-deportable under Section 241(a)(1) of that Act (8 U.S.C. 1251 (a)(1), *supra*) as an alien who was at the time of entry excludable by the law existing at the time of such entry (Appellant's App. 2a-4a). Petitioner made no specific objection to the order of the Board of Immigration Appeals holding against his application for suspension of deportation. The District Court, after a hearing addressed solely to the issue of his deportability under the 1952 Act, granted the writ of habeas corpus on the sole basis that his status of non-deportability had been preserved by the savings provision in the 1952 Act. The respondent filed an appeal limited to this single issue.

On October 14, 1957, the Court of Appeals reversed the judgment of the District Court (Pet. 19) on the basis of this Court's decision in *Lehmann* v. *Carson*, 353 U.S. 685, rendered after the judgment of the District Court in the instant case. The Court of Appeals

---

three of the witnesses referred to in the investigatory report identified in the immigration record as Exhibit 11, which he contended were favorable to his character, and negated any adverse implication contained in the investigator's report (Pet. 17). The Board of Immigration Appeals stated, however, that (Pet. 16-17), "An independent character investigation conducted by the Service is not entirely favorable to the [petitioner's] application for the discretionary relief of suspension of deportation (Ex. 12)."

noted that the *Carson* case was (Pet. 19) "not distinguishable from the case at bar." On February 21, 1958, the Court of Appeals denied petitioner's motion for rehearing (Pet. 19), based on contentions going to the legality of the denial by the Board of Immigration Appeals of petitioner's application for suspension of deportation—contentions which were neither specifically raised in his application for a writ of habeas corpus, nor on the respondent's appeal, and which were apparently suggested for the first time in the brief of the appellee in the Court of Appeals.

ARGUMENT

1. Petitioner's contention that the Board of Immigration Appeals erroneously relied on confidential information in denying him the discretionary relief of suspension of deportation is not properly at issue for two reasons. First, the point was not specifically raised nor relied on by petitioner in his petition for a writ of habeas corpus in the District Court, it was not dealt with by the District Court in its order granting the writ, and it is outside the issue of the legality of petitioner's deportation, the sole basis of the respondent's appeal to the Court of Appeals from an adverse decision on that issue rendered by the District Court.

Secondly, it is clear from the opinion of the Board of Immigration Appeals (Pet. 15-17) that it did not rely on confidential information to support its primary conclusion that petitioner was not entitled to the discretionary relief of suspension of deportation. The controlling conclusion of the Board is that (Pet. 17),

"On this record, we are unable to make the required finding that the [petitioner's] deportation would result in exceptional and extremely unusual hardship to himself or to his family." Such a conclusion does not depend on evidence which negates petitioner's good character but on the absence of affirmative proof that deportation would produce the kind of hardship which Congress has made a necessary condition to the discretionary relief sought. This was also the basis of the denial of such relief by the Special Inquiry Officer (see *supra*, p. 5). It obviously is, under the statute, a valid basis for the denial of such relief. While the Board also observed that (Pet. 17), "Furthermore, we do not believe that this is a case that should be sent to Congress with the request for suspension of deportation," and noted that there was confidential information in the file in support of this subsidiary conclusion, it did not base its denial of relief on this alternative ground. Regardless of the validity of petitioner's argument in respect to the legality of the use of confidential information as the basis for the denial of discretionary relief, that issue, however resolved, does not affect the controlling fact relied on by the Board—that the record does not support the required finding that deportation would result in exceptionally and extremely unusual hardship to the alien or his family. This is a conclusion which is not based on confidential information, and which certainly is "neither capricious nor arbitrary." *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77.

Even if the exercise of administrative discretion had been based on the use of confidential information,

it is clear that, in the circumstances of this case, such procedure would not have been improper. The Board made specific reference to its authority under a Service regulation (8 C.F.R., 1952 rev., 244.3, *supra*) to use confidential information (Pet. 17), "in considering the issue of discretionary relief." The validity of this regulation which allows the discretionary denial of suspension to (8 C.F.R., 1952 rev., 244.3) "be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security," was expressly upheld in *Jay* v. *Boyd*, 351 U.S. 345. Specific reference to the regulation should be an adequate indication that the Board in this instance determined that "the public interest" required that the confidential information not be disclosed.

2. Petitioner's further contention that he obtained a status of non-deportability under the immigration laws subsequent to his illegal entry into this country in 1922, which status was preserved by the savings clause contained in Section 405(a) of the Immigration and Nationality Act of 1952 (*supra*), is fully met by this Court's recent opinion in *Lehmann* v. *Carson*, 353 U.S. 685, rehearing denied, 354 U.S. 944. See also *Mulcahey* v. *Catalanotte*, 353 U.S. 692.[4] There is no basis for petitioner's attempt to distinguish his case from *Carson* by virtue of the fact that

[4] This contention was not raised by petitioner before the Immigration Service but was apparently made for the first time in the instant judicial proceedings.

no prior deportation proceedings were instituted against that respondent who entered this country as a stowaway in 1919, whereas in this case deportation proceedings were instituted in 1927 but were dismissed because not commenced within the statutory limitation period of five years which then controlled. The *Carson* case held that, whether or not the savings provision of the 1952 Act preserved a status of nondeportability unless "otherwise specifically provided", Congress did specifically provide for the deportation of persons situated as is petitioner, and that such persons are deportable under the 1952 Act if they fall within the prescribed classes, regardless of their deportability under the prior legislation. The Court was unanimous in its view that the statute so provided. 353 U.S. at 690.

Petitioner also asks this Court to reconsider its ruling in *Carson* (Pet. 10-11) "because the opinion fails to distinguish whether the Court intended that all aliens are deportable who were excludable at the time of entry from those aliens who were excludable at the time of entry and later adjusted their status in the United States to legal residence." This contention was also made in the *Carson* case (see Pet. Reply Br., No. 72, O.T. 1956, pp. 10-12). Here, as there, the proposition is an academic one since neither Carson nor this petitioner adjusted his status to that of legal resident after his illegal entry. As the *Carson* opinion makes clear, the illegal residence of neither ripened into a legal status by the inability of the government to deport them under the then existing five-year time limitation provision.

In any event, as we pointed out in the *Carson* case (see Pet. Reply Br., No. 72, O.T. 1956, pp. 10-12), the treatment of an alien who had his status adjusted to that of legal resident is the same either under the old or new law and has not been affected by the repealer. A person who was given a right of legal residence under the old law was not deportable then, any more than he would be under the new Act. The retrospective nature of Section 241 requires only that prior facts be judged by the new law; it does not wipe out reasons for not being deported which were valid under the old law and which remain valid under the new law. The basis on which petitioner asks this Court to review its recent *Carson* decision therefore has no application to the facts of this case, and petitioner raises no further challenge to its validity nor cites any change or variation of circumstances warranting reconsideration of this recent holding.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

JUNE 1958

☆ U. S. GOVERNMENT PRINTING OFFICE 1958 467913 1966